No. 95-806

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PENN ADVERTISING OF BALTIMORE, INC.,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, A MUNICIPAL CORPORATION; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

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ARGUMENT

This supplemental brief in opposition is filed in light of *44 Liquormart, Inc. v. Rhode Island*, No. 94-1140 (1996 WL 241709, decided May 13, 1996). The decision in that case provides no proper occasion for entry here of a summary reconsideration order. The premises upon which the Fourth Circuit decided this case are not undercut by the rationale in any of the separate opinions in *44 Liquormart*. Remand for further consideration is not warranted. *See, Lawrence v. Chater*, 116 S.Ct. 604, 607 (1996) (*per curiam*).

Both factually and legally, the instant case is far removed from *44 Liquormart*. The Fourth Circuit did not even cite the flawed decision of the First Circuit, much less rely on it. In upholding Baltimore's limited restriction on the placement of billboards advertising cigarettes, the Fourth Circuit placed no reliance on the "greater includes the lesser" reasoning of *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 354-346 (1986), nor on the notion that commercial speech jurisprudence includes a "vice exception." The Fourth Circuit's opinion adheres faithfully to *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), which in the aftermath of *44 Liquormart* remains the standard binding on all lower courts.

The principal opinion in *44 Liquormart* teaches that " 'special care' should attend the review of . . . blanket bans" of commercial speech. *44 Liquormart*, 1996 WL 241709 *9, quoting *Central Hudson*, 447 U.S. at 566. Unlike the blanket ban involved in *44 Liquormart*, the instant case involves a *limited* restriction on the location of billboards,

and allows ample alternative means for *billboard* advertising. Thus, even with reference to the rationale of part V of the opinion authored by Justice Stevens, this is a case for application of less than strict review. The Fourth Circuit did, however, hold Baltimore to its burden of demonstrating beyond mere speculation and conjecture that its restriction would advance its concededly substantial purpose. The Fourth Circuit found that Baltimore met its burden by reference to studies showing a definite correlation between cigarette advertising and underage smoking, which is a method of proof endorsed by this Court. *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371, 2378 (1995).

Unlike *44 Liquormart* and *Posadas*, this case does not involve a speech ban which screens from public view the underlying governmental policy. Baltimore's purpose is to reduce underage smoking. The most direct method to achieve that goal – banning the *sale* of cigarettes to minors – has been tried without adequate success. Because Baltimore found, based on competent evidence, that a direct regulation of cigarettes is insufficient to dampen demand by minors, its reasonably tailored and limited restriction on speech promoting cigarettes is permissible. *Cf. 44 Liquormart*, 1996 WL 241709 *18 (Thomas, J., concurring in part and concurring in the judgment) and *19 (O'Connor, J., concurring in the judgment).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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